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No. 92-430

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

EL PASO NATURAL GAS COMPANY,
a Delaware corporation,
Petitioner,

v.

THE HARTFORD ACCIDENT AND INDEMNITY CORPORATION,
a Connecticut corporation,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

JAMES C. MARTIN
(Of Counsel)
CROSBY, HEAFEY, ROACH & MAY
Professional Corporation
700 South Flower Street
Suite 2200
Los Angeles, CA 90017
(213) 896-8000

PAUL C. DROZ
(Counsel of Record)
JOY L. CLEGG
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place
Eleventh Floor
Post Office Box 45000
Salt Lake City, UT 84145
(801) 521-9000

Attorneys for Respondent,
The Hartford Accident and Indemnity Corporation

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. On the facts of this diversity case, did the Tenth Circuit Court of Appeals correctly apply state contract law in holding that the "pollution exclusion" in the insurance policies at issue excludes coverage for property damage arising out of El Paso Natural Gas Company's regular, deliberate and continuous discharges of toxic wastes into and onto its land for 15 years?

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 962 F.2d 1484 (10th Cir. 1992), and is reprinted in the Appendix to the Petition for a Writ of Certiorari at 1a-17a. The order of the Tenth Circuit denying rehearing is reprinted in the Appendix to the Petition at 18a-19a.

The opinion and order of the United States District Court for the District of Utah (Jenkins, C.J.), granting summary judgment for the Hartford Accident and Indemnity Corporation (Hartford), are reported at 765 F. Supp. 677 (D. Utah 1991), and are reprinted in the Appendix at 20a-28a.

JURISDICTION

This action was brought in the United States District Court for the District of Utah under 28 U.S.C. § 1332 (a) (1). On February 28, 1991, the district court granted summary judgment for Respondent Hartford under Federal Rule of Civil Procedure 56. On April 30, 1992, the Tenth Circuit Court of Appeals issued its unanimous opinion affirming that judgment. On June 9, 1992, the Tenth Circuit entered an order denying Petitioner's petition for rehearing and rejecting its suggestion for rehearing en banc.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Perhaps the central theme of El Paso Natural Gas Company's Petition is that there should be coverage for the toxic chemical discharges here because El Paso, like most polluters, did not really mean to damage the property of third parties or the environment. But that type of self-serving observation skirts the true issue of insurance policy construction presented in this proceeding. The issue of construction here turns on the language of the pollution exclusion in El Paso's liability policy, which provides that El Paso's liability insurance *does not* apply:

> (f) to *bodily injury* or *property damage* arising out of the discharge, dispersal, release or escape of . . . toxic chemicals, . . . waste materials, or other . . . pollutants into or upon the land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental. . . . (Doc. 94, Exh. 4)

When the language of the pollution exclusion is considered, El Paso's demand for coverage completely breaks down. El Paso does not dispute that its discharges of

toxic wastes into and onto its land were the ultimate source of all the property damage for which it seeks coverage here. Nor does it dispute that those discharges were continuous, deliberate or anything other than the routine and regular manner by which El Paso conducted its business. If the plain language of El Paso's policy is followed, therefore, there can be no coverage for the property damage arising from those discharges.

From 1959 through 1974, El Paso operated a natural gas transmission system running through Washington, Oregon, Idaho, Wyoming, Utah, Colorado and New Mexico. (Doc. 95, Exh. 1, p. 2)

While it operated the system, El Paso used Pydraul AC, a product which contained a polychlorinated biphenyl ("PCB"), as an air compressor lubricating oil at 15 different compressor stations located in the various states. (Doc. 95, Exh. 1) The lubricant was continuously poured into an 8-quart reservoir, which fed it at a rate of 3 or 4 drops per minute into a cylinder. While in the cylinder, some of the lubricant vaporized and went with the compressed air to an air receiver bottle where, because of the increased air pressure, the used lubricant condensed and settled to the bottom of the bottle.

To keep the air system as dry as possible, El Paso's employees drained the air receiver bottles every day by means of a drain valve. They then disposed of the condensed liquid waste (including the PCB's) by dumping it into and on the property surrounding the compressor stations. As Lori Komatar, the engineer in charge of cleaning up El Paso's PCB-contaminated property explained:

> Q: How did the PCBs get there?
>
> A: Poor management practices. There was what we call a blow-down pot which we found outside several of the buildings at not all locations, a number of locations anyway . . . where initially material was discharged directly out of the building into the

> ground . . . . [W]e have also had people at the plant site say, well, the storm water drain is there, they just went in and dumped it down the drain because they didn't want to get the floor dirty.
>
> * * * *
>
> Later where they found that this was just not a good practice to discharge oil directly into the ground, they started running it to the pits. (Komatar Depo., Vol. 1, pp. 121-22)

Thus, at some compressor stations El Paso simply drained the PCB contaminants from the air receiver bottles directly into the ground. At other stations, the contaminants were drained into a concrete waste oil sump which was then periodically pumped out into unlined earthen pits.

The unlined pits also had discharge pipes designed to allow any overflow to drain directly onto and into the surrounding ground. As Lori Komatar again explained:

> A: The pit itself is berm. It's about, stands about three feet above the ground surface and the pit is dug about eight feet into the bottom, in to the ground.
>
> Q: Go ahead.
>
> A: So I was trying to find out how it was possibly getting out of the pit, the oil, and the PCB oil or what but how that material was getting out of the pit. And we didn't have any idea how it could be getting out so we talked to some other people at the station who had been there for quite some time and they indicated that there had been an overflow pipe in the pit that as the level got up to a certain height on the berm it would discharge out to the north from the pit.
>
> Q: The overflow pipe went off to the north?
>
> A: Right. The overflow pipe came out of the pit to the north. (Komatar Depo., Vol. 1, pp. 53-54)

Most of the lubricant containing the PCBs stayed in the air compressors instead of being vaporized and set-

tling in the air receiver bottles. This contaminated liquid was removed from the compressors during frequent oil changes and equipment overhauls and was disposed of in the same way as the condensed PCBs. It was either drained into the local waste oil sumps, which were then pumped into the unlined earthen pits, or simply dumped directly on the ground.

In 1974, El Paso sold its natural gas transmission system to Northwest Pipeline Corporation. El Paso agreed, as part of the contract of sale, to indemnify Northwest for any liability or expense arising from El Paso's activities prior to transferring the system to Northwest. (Doc. 95, Exh. 1, pp. 2-3)

Northwest discovered the PCB contamination at the compressor stations in 1987. Northwest reported the contamination to governmental agencies, including the United States Environmental Protection Agency (EPA). Pursuant to consent orders entered into with the EPA, Northwest cleaned up the PCB contamination in the air system equipment, drains, sumps, pits, the ground surrounding the pits that had been contaminated by the discharge pipes, and those areas around the auxiliary buildings where waste oil had been dumped directly on the ground.

On June 22, 1987, Northwest filed a lawsuit against El Paso to recover the cleanup costs necessitated by El Paso's contamination of the equipment and property. (Doc. 95, Exh. 1, ¶¶ 6-9) As a result of its own investigation in the Northwest lawsuit, El Paso believed that it probably was "one hundred percent responsible" for the cleanup costs and also determined that those costs could reach $15 million. Therefore, on July 18, 1988, El Paso agreed to pay Northwest the $6.6 million necessary to settle the lawsuit involving the cleanup costs.

After paying Northwest, El Paso demanded that Hartford and its other liability carriers indemnify it for the full amount of the settlement. Hartford insured El Paso

for general liability from January 1, 1976 to January 1, 1986. (Doc. 1, p. 3) On the basis of the express language of its policy, Hartford declined to indemnify El Paso and instead filed this declaratory relief action to establish that it did not cover the damage caused by El Paso's discharges of toxic chemicals.

Hartford thereafter moved for summary judgment on the grounds that any damage arising from El Paso's regular, deliberate and continuous discharge of toxic waste over the 15 years it operated the pipeline was not covered by the express terms of El Paso's liability policy. (*See* Docs. 43, 94, 95, 101, 102, 110, 119 and 122) Hartford's motion was based on the application of the "pollution exclusion" in the policy, which excludes coverage for bodily injury or property damage arising from the non-sudden or non-accidental discharge of toxic chemicals or wastes into or upon anyone's land. (Doc. 94, Exh. 4)

After the matter was submitted, the district court entered a comprehensive ruling in favor of Hartford. (Doc. 125) The court explained that the focus of the pollution exclusion was not on whether El Paso expected or thought it was causing property damage to third parties or releasing pollutants into the environment, but solely on whether the toxic discharges, from which the property damage arose, were sudden and accidental. 765 F. Supp. at 679-81. The court also reasoned that the phrase "sudden and accidental," as used in the pollution exclusion, should be given its "plain and simple meaning;" i.e., "happening without notice and occurring by chance." (*Id.*) In that regard, since there was nothing sudden or accidental about El Paso's 15 years of toxic waste discharges into and on its land, the court held that there could be no coverage under the plain language of El Paso's policy. (*Id.*)

El Paso appealed and the Tenth Circuit Court of Appeals unanimously agreed with the district court's analysis of the controlling provisions of El Paso's insurance

policy. Following precedent from Utah appellate courts and the courts of other districts, the Tenth Circuit, like the district court, held that the phrase "sudden and accidental" should be construed in context to mean "temporarily, abrupt and unexpected or unintended." 962 F.2d at 1487-92. Therefore, because El Paso's discharges of toxic waste on its land could not be considered "sudden" or "accidental," coverage for the property damage arising from El Paso's toxic discharges was expressly excluded by the plain language of the pollution exclusion in El Paso's policy. (*Id.*)

REASONS FOR DENYING THE WRIT

THIS CASE INVOLVES ONLY A CONTROLLING QUESTION OF STATE CONTRACT LAW AND THE TENTH CIRCUIT CORRECTLY APPLIED UTAH LAW TO RESOLVE THIS CASE IN FAVOR OF HARTFORD

This Court has long instructed that "state law determinations by the Court of Appeals will rarely constitute an appropriate subject" for its review. *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983). Indeed, this Court pays "great deference" to the views of the lower federal courts on controlling issues of state law, and "is hesitant to overrule decisions by the federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable." *Bishop v. Wood*, 426 U.S. 341, 346 n.10 (1976).

Try as it might, Petitioner cannot change this diversity case from what it is—a fact-bound determination involving state law issues of contract interpretation. The Tenth Circuit did not keep the narrow scope of its decision a secret. On the contrary, its opinion makes it plain that it gave the insurance policy at issue here the interpretation it believed the Utah Supreme Court would when applying Utah substantive law. 962 F.2d at 1486-88.

Petitioner relies on *Erie v. Tompkins* and conjures up a variety of other rationales, including the supposed need

for nationwide uniformity of the law of the various states on the pollution exclusion, to justify the grant of its Petition. But this case does not present an issue of federal law, a conflict among the circuits construing an issue of federal law, or any other reason conceivably justifying this Court's review. The Tenth Circuit merely carried out its mission to interpret Utah law and it reached the result that Utah law compelled. Even if it had erred, Petitioner's disagreement with that result could not make this case worthy of this Court's review. This case would remain what it always has been—a dispute about the application of state law principles of contract construction. Such a dispute does not meet the criteria of Supreme Court Rule 10.1.

In any event, the Tenth Circuit was correct in holding that the pollution exclusion precludes coverage for property damage arising from El Paso's discharges of toxic wastes at its compressor stations. Although the Court gets no hint of it from the Petition, the undisputed evidence is that for 15 years El Paso engaged in the regular, deliberate and continuous discharge of toxic waste into and onto the land at each of the compressor stations along its pipeline.

Contrary to Petitioner's assertions, the overwhelming weight of authority from state to state and circuit to circuit, in trial and appellate courts alike, has interpreted the pollution exclusion precisely at the Tenth Circuit did here—to preclude coverage of property damage arising out of the regular and routine discharge of toxic wastes by the insured onto its land. There is nothing "sudden and accidental" about property damage arising from toxic discharges that occur continuously and deliberately over a period of many years as a matter of regular business practice. Property damage arising from such non-sudden or non-accidental discharges is, moreover, precisely what the plain language of the exclusion excludes from coverage. *E.g.*, *Liberty Mut. Ins. Co. v. Triangle Indus.*, 1992 WL 37135 (4th Cir. 1992);

Broderick Ins. Co. v. Hartford Acc. & Indus., Indem. Co., 954 F.2d 601, 605-08 (10th Cir. 1992); *Northern Ins. Co. of New York v. Aardvark Assoc., Inc.*, 942 F.2d 189, 192-93 (3d Cir. 1991); *Lumbermens Mut. v. Belleville Indus.*, 938 F.2d 1423, 1425, 1430-31 (1st Cir. 1991); *A. Johnson & Co. v. Aetna Casualty & Sur. Co.*, 933 F.2d 66, 73 (1st Cir. 1991); *New Castle County v. Hartford Acc. & Indem. Co.*, 933 F.2d 1162, 1202 (3d Cir. 1991); *Ogden Corp. v. Travelers Indem. Co.*, 924 F.2d 39, 42 (2d Cir. 1991); *Grant-Southern Iron & Metal Co. v. CNA Ins. Co.*, 905 F.2d 954, 956-57 (6th Cir. 1990); *EAD Metallurgical, Inc. v. Aetna Cas. & Sur. Co.*, 905 F.2d 8, 9-11 (2d Cir. 1990); *F.L. Aerospace v. Aetna Cas. & Sur. Co.*, 897 F.2d 214, 217-20 (6th Cir.), *cert. denied*, 111 S.Ct. 284 (1990); *United States Fid. & Guar. Co. v. Star Fire Coals, Inc.*, 856 F.2d 31, 34-35 (6th Cir. 1988); *Great Lakes Container v. National Union Fire Ins. Co.*, 727 F.2d 30, 33-34 (1st Cir. 1984).[1]

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[1] To dispel any doubt about where the overwhelming weight of authority lies on this issue, Hartford refers the Court to the following cases in which the pollution exclusion was held to bar coverage where toxic wastes were regularly and continuously discharged by the insured onto its land as a routine business practice, resulting in contamination to soil and ground or surface waters: *Hayes v. Maryland Cas. Co.*, 688 F. Supp. 1513, 1515-16 (N.D. Fla. 1988); *U.S. Fidelity & Guarantee v. Korman Corp.*, 693 F. Supp. 253, 259-61 (E.D. Pa. 1988); *Fischer & Porter Co. v. Liberty Mut. Ins. Co.*, 656 F. Supp. 132, 140 (E.D. Pa. 1986); *American States Ins. Co. v. Maryland Cas. Co.*, 587 F. Supp. 1549, 1553 (E.D. Mich. 1984); *see International Minerals & Chem. Corp. v. Liberty Mut. Ins. Co.*, 552 N.E.2d 758 (Ill. App. 1988); *Waste Mgt. of Carolinas, Inc. v. Peerless Ins. Co.*, 340 S.E.2d 374 (N.C. 1986); *Techalloy Co. v. Reliance Ins. Co.*, 487 A.2d 820 (Pa. Super. 1984).

There are many more. *State of New York v. Amro Realty Corp.*, 745 F. Supp. 832, 839 (N.D.N.Y. 1990), *aff'd on this issue*, 936 F.2d 1420, 1428-29 (2d Cir. 1991); *USF&G v. Morrison Grain Co.*, 734 F. Supp. 437, 447-49 (D. Kan. 1990); *Fireman's Fund Ins. v. Ex-Cell-O Corp.*, 702 F. Supp. 1317, 1323-24 (E.D. Mich. 1988); *Hybud Equipment Corp. v. Sphere Drake Ins. Co., Ltd.*, No. 91-611 (OH Sept. 16, 1992); *Upjohn Co. v. New Hampshire Ins. Co.*, 476 N.W. 2d 392 (Mich. 1991); *Lumbermens Mut. Cas. Co. v.*

Nor is there any dispute in this case involving the meaning to be given to the phrase "sudden and accidental," as used in the pollution exclusion in El Paso's policy. That question was resolved in favor of Hartford by the Utah Court of Appeals in *Gridley Assoc's., Ltd. v. Transamerica Ins. Co.*, 828 P.2d 524, 526-27 (Utah App. 1992). The Tenth Circuit correctly followed *Gridley*, as it was compelled to do. 962 F.2d at 1490. Further, every court that has applied Utah contract construction principles law to define the meaning of "sudden and accidental" in the pollution exclusion has reached the same result as *Gridley*. *See Anaconda Minerals*, 773 F.Supp. at 1505; *Hartford Acc. & Indem. Co.*, 765 F.Supp. at 680-81; *Sharon Steel v. Aetna Casualty & Sur. Co.*, Nos. C-87-2306 and C-87-2311 and 28 (3d Cir. Utah July 20, 1988). The Utah law is uniform. There surely is no need for this Court to disrupt it.

Belleville Indus., 555 N.E.2d 568 (Mass. 1990); *Hicks v. American Resources Ins. Co., Inc.*, 554 So. 2d 952 (Ala. 1989); *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 570 N.E.2d 1154 (Ill. App. 1991).

And more still. *Anaconda Minerals v. Stoller Cemicals*, 773 F. Supp. 1498, 1504-05 (D. Utah 1991); *Hudson Ins. Co. v. Double D. Mgmt. Co.*, 768 F. Supp. 1542, 1547-48 (M.D. Fla. 1991); *USF&G v. T.K. Stanley, Inc.*, 764 F. Supp. 81, 84-85 (S.D. Miss. 1991); *CPC Intern v. Northbrook Excess & Surplus Inc.*, 759 F. Supp. 966, 973-76 (D.R.I. 1991); *Covenant Ins. Co. v. Friday Eng., Inc.*, 742 F. Supp. 708, 711-12 (D. Mass. 1990); *Borden, Inc. v. Affiliated FM Ins. Co.*, 682 F.2d 927, 930 (S.D. Ohio 1987), *aff'd*, 865 F.2d 1267 (6th Cir. 1989); *American Motorists Ins. Co. v. General Host Corp.*, 667 F. Supp. 1423, 1429 (D. Kan. 1987), *aff'd on other grounds*, 946 F.2d 1482 (10th Cir. 1991); *Centennial Ins. Co. v. Lumbermans Mut. Cas. Co.*, 677 F. Supp. 342, 347-49 (E.D. Pa. 1987); *American Mut. Liability Ins. v. Neville Chemical*, 650 F. Supp. 929, 931-33 (E.D. Pa. 1987); *Technicon Electronics Corporation v. American Home Assurance Company*, 542 N.E.2d 1048, 1049-51 (N.Y. 1989); *Lower Paxton Township v. United States Fidelity & Guaranty Company*, 557 A.2d 393, 402 (Pa. Super. 1989); *Powers Chemco, Inc. v. Federal Ins. Co.*, 548 N.E.2d 1301, 1302 (N.Y. 1989); *Transamerica Ins. Co. v. Sunnes*, 711 P.2d 212, 244 (Or. App. 1985).

Thus, notwithstanding Petitioner's creative efforts to make it so, there is simply no issue here for this Court to review. It is not within this Court's purview to bring "nationwide uniformity" to state law principles of contract construction as applied in diversity cases and that is true whether the issue involves the construction of an insurance policy or any other contract.

Even if this Court could somehow undertake that task, there is no compelling need for it to do so in this case. There already is a solid—indeed overwhelming—nationwide consensus that property damage arising from regular, deliberate and continuous discharges of toxic waste, like those involved here, is expressly excluded from coverage by the plain terms of a CGL policy, like El Paso's. If any cases are in need of this Court's attention, it is those decisions that have reached a contrary conclusion, and not one, like the Tenth Circuit's, that has landed firmly in the mainstream.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES C. MARTIN
(Of Counsel)
CROSBY, HEAFEY, ROACH
& MAY
Professional Corporation
700 South Flower Street
Suite 2200
Los Angeles, CA 90017
(213) 896-8000

PAUL C. DROZ
(Counsel of Record)
JOY L. CLEGG
SNOW, CHRISTENSEN
& MARTINEAU
10 Exchange Place
Eleventh Floor
Post Office Box 45000
Salt Lake City, UT 84145
(801) 521-9000

Attorneys for Respondent,
The Hartford Accident and Indemnity Corporation

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